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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JUAN CARLOS RAMIREZ, Respondent, v. DENYS MAGALI GUTIERREZ-CARRENO, Appellant.	D055115 (Super. Ct. No. D515762)

APPEAL from an order of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed.

Denys Magali Gutierrez-Carreno (Mother) appeals an order granting the petition of Juan Carlos Ramirez (Father) and requiring the return of their 10-year-old daughter to Colombia pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, T.I.A.S. No. 11670 (the Convention). On appeal, Mother contends: (1) the trial court erred by denying her motions for a continuance of the hearing on the petition; (2) she was denied her due process right to a fair and impartial hearing

because the San Diego County Deputy District Attorney wrongfully represented Father at the hearing; and (3) the trial court erred by excluding certain evidence.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father are citizens of Colombia. Their daughter, Valerie, was born in Colombia in February 1999. Mother and Father were married in Colombia in August 2001. They lived together until early 2008 when Mother learned Father was having an affair. On May 15, 2008, Mother and Father separated.

Father agreed that Mother could take Valerie with her on a vacation to visit Mother's sister in La Mesa, California, from December 3, 2008, through February 13, 2009. Between December 4 and 22, 2008, Father regularly spoke by telephone with Valerie. During a December 23 telephone conversation, Mother informed Father that she would not allow Father to see Valerie again and she (Mother) would remain in the United States with Valerie. Father made repeated unsuccessful attempts thereafter to telephone Mother. On January 20, 2009, Father telephoned again and Valerie unexpectedly answered Mother's telephone. Valerie told Father she missed him and wanted to return to her school in Colombia. She said that Mother prohibited her from using the telephone and computer to contact him. Mother then took the telephone away from Valerie and told Father that she and Valerie were not going to return to Colombia and would remain in the United States. On February 13, Mother and Valerie did not arrive in Colombia on their scheduled return flight.

On March 6, 2009, Father filed a petition in Colombia for the return of Valerie to Colombia pursuant to the Convention. On May 1, the San Diego County District

Attorney's office filed the instant petition in the trial court for the return of Valerie to Colombia pursuant to the Convention and the International Child Abduction Remedies Act (ICARA) (42 U.S.C. § 11601 et seq.). On May 1, the trial court issued an order directing Valerie be placed in protective custody pending a hearing on the petition, and also issued a notice to Mother that a hearing on the petition would be held at 1:45 p.m. on May 4. On the afternoon of May 1, Mother's attorney became aware of the petition and the scheduled May 4 hearing.

At about 2:00 p.m. on May 4, 2009, the trial court began the hearing on the petition. Mother and Father were present with Spanish interpreters and both testified at the hearing. Mother was represented by two bilingual attorneys. Mother did not dispute that Colombia was Valerie's country of habitual residence and that Valerie had been wrongfully retained in the United States. Mother's primary, if not sole, defense to the petition was that Valerie's return to Colombia would pose a "grave risk" of harm to her. (Convention, art. 13b; 42 U.S.C. § 11603(e)(2)(A).) After considering the evidence and hearing arguments, the trial court found that Mother had not presented sufficient evidence, or offers of proof, showing Valerie's return to Colombia would pose a grave risk to her. Accordingly, the court issued an order directing that Valerie be returned to Colombia pursuant to the Convention. Mother timely filed a notice of appeal.

DISCUSSION

I

Mootness

Father contends that Mother's appeal of the return order should be dismissed as moot because Valerie is now in Colombia and this court cannot grant any effective relief.

A

"A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief." (*Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503.) "An appeal is moot when as a result of changed circumstances the trial court on remand would be unable to grant the relief sought by the appellant." (*Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1226-1227.)

There is split authority on the issue of whether an appeal becomes moot when a child returns to his or her country of habitual residence after a trial court issues an order granting a petition under the Convention. In *Bekier v. Bekier* (11th Cir. 2001) 248 F.3d 1051, cited by Father, the trial court issued an order directing that the child be returned to Israel. (*Id*. at p. 1053.) During the pendency of the appeal, the child returned to Israel with his father. (*Ibid*.) The appellate court concluded the *mother's* appeal was moot because the *father* had obtained the relief he sought in his petition under the Convention. (*Id*. at p. 1054.) Because no stay of the order had been issued and the child had returned with his father to Israel, the appellate court concluded it was "powerless to grant the relief requested by [the mother]" and therefore dismissed her appeal. (*Id*. at p. 1055.) *Bekier*

stated: "[The mother's] potential remedies now lie in the Israeli courts. Any words by us would be merely advisory." (*Id*. at p. 1054.)

Disagreeing with *Bekier*, *Fawcett v. McRoberts* (4th Cir. 2003) 326 F.3d 491 concluded an appeal was *not* moot even though the child had been returned to Scotland pending the father's appeal of the trial court's order under the Convention. (*Id*. at pp. 494-497.) *Fawcett* stated: "The overwhelming majority of other courts have . . . routinely consider[ed] the merits of an appeal from an order returning a child to a foreign country, even when compliance with the order has resulted in the child's presence in a foreign country." (*Id*. at p. 494.) *Fawcett* noted that *Bekier*, in dismissing the appeal as moot, did not acknowledge that wealth of authority. (*Fawcett*, at p. 495.) Disagreeing with *Bekier*, *Fawcett* reasoned: "[N]o law of physics would make it impossible for [the mother] to comply with an order by the district court that she return [the child] to the United States. To the contrary, such orders are fully within the district court's power and are commonly issued by courts in the United States." (*Id*. at p. 496.) *Fawcett* was not persuaded that an absence of effective methods for enforcement of a court order necessarily meant the case was moot. (*Ibid*.) *Fawcett* concluded: "[E]ven if the United Kingdom's courts did not recognize the order of a United States court, such an order could still 'affect the matter in issue.' [Citation.] For example, [the mother] could comply with the court's order of her own volition. Or, if [she] failed to comply with the order, she could be held in contempt, and penalties could be assessed. [Citation.] Alternatively, it seems not too remote a possibility that [she] could at some point return to the United States with [the child], at which time [the father] could seek to enforce such an

order." (*Id*. at p. 497.) Accordingly, *Fawcett* concluded the father's appeal was not moot and addressed the merits of his appeal. (*Ibid*.)

Subsequently, another federal circuit court of appeals rejected *Bekier*'s reasoning and found *Fawcett*'s reasoning persuasive, concluding an appeal of a return order under the Convention was not moot despite the child's return to Canada, her country of habitual residence. (*Whiting v. Krassner* (3d Cir. 2004) 391 F.3d 540, 545-546; see also *Velez v. Mitsak* (Tex.App. 2002) 89 S.W.3d 73, 84 [addressing merits of appeal despite child's return to Spain]; *In re J.G.* (Tex.App. 2009) 301 S.W.3d 376, 379-380 [concluding appeal of return order was not moot despite child's return to Mexico].)

B

We are persuaded by the reasoning of *Fawcett* that an appeal of a return order under the Convention is not moot merely because there may not be practical or effective methods for enforcement of that order. An appeal may nevertheless provide practical or effective relief to the appellant. The foreign country (here Colombia) may recognize an order of a United States court requiring the return of a child. Even if it does not, a United States court could hold the noncomplying parent in contempt if he or she does not return the child to the United States. Furthermore, that parent may voluntarily comply with the court order or, alternatively, become subject to jurisdiction of the United States when traveling with the child in the United States. Finally, as Mother argues, it is possible that a reversal of the trial court's order could have an indirect effect on custody proceedings in

the foreign country (here Colombia). Accordingly, we conclude Mother's appeal is not moot and proceed to address the merits of her appeal.[1]

II

The Convention Generally

The Convention, to which the United States and Colombia are signatories, "was adopted in an effort 'to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their *prompt return* to the State of their habitual residence, as well as to secure protection for rights of access.' [Citations.] . . . [The Convention] provides a means by which to restore the status quo when one parent unilaterally removes the child from the child's country of habitual residence and/or retains the child in a new jurisdiction. [Citation.] [¶] The only function of a proceeding under the Convention is to decide whether a child should be returned to the country of the complaining parent; it does not govern the merits of parental custody disputes, but leaves those issues to be determined by appropriate proceedings in the child's country of habitual residence." (*In re Marriage of Forrest & Eaddy* (2006) 144 Cal.App.4th 1202, 1210, italics added (*Forrest*).)

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1 On November 19, 2009, Father filed a motion for judicial notice of certain official documents of the Colombian government (which purportedly establish his rights of custody of Valerie) solely as those documents relate to the mootness issue. However, Father does not persuade us that we must, or should, take judicial notice of those documents under Evidence Code sections 452 or 459 or the Convention. Accordingly, we deny his motion for judicial notice. In any event, assuming arguendo we took judicial notice of those documents, they would not change our conclusion that the instant appeal is not moot.

"If the petitioner succeeds in showing a wrongful removal or retention, the court must order the child's return to the country of habitual residence unless the respondent demonstrates that one of four exceptions applies. [Citations.] As relevant here, the Convention recognizes an exception to the requirement for return of the child to her habitual residence where there is a 'grave risk' that doing so 'would expose [her] to physical or psychological harm or otherwise place [her] in an intolerable situation.' [Citations.] [¶] . . . [¶] Absent extreme circumstances in the country of habitual residence (such as war or famine), the grave risk of harm exception is established only if there is clear and convincing evidence that the child would suffer 'serious abuse' as a result of being returned. [Citations.] The classic example of when the exception has been applied is where a child had previously been subjected to sexual abuse by the custodial parent." (*Forrest*, *supra*, 144 Cal.App.4th at p. 1211.)

III

Denial of Motions for Continuance

Mother contends the trial court erred by denying her motions for continuance of the May 4, 2009, hearing on the petition under the Convention.

A

California Rules of Court, rule 3.1332, provides: "(a) To ensure the prompt disposition of civil cases, the dates assigned for a trial are firm. . . . [¶] (b) A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the request for a continuance by a noticed motion or an ex parte application under the rules in chapter 4 of this division, with supporting

declarations. The party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered. [¶] (c) Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance *only on an affirmative showing of good cause* requiring the continuance. . . ." (Italics added.) Such good cause may include: "(6) A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts; or [¶] (7) A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial." (Cal. Rules of Court, rule 3.1332(c)(6), (7).)

A trial court's order granting or denying a motion for continuance is reviewed for abuse of discretion. (*Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 858, 863.) "The trial court's exercise of that discretion will be upheld if it is based on a reasoned judgment and complies with legal principles and policies appropriate to the case before the court. [Citation.] A reviewing court may not disturb the exercise of discretion by a trial court in the absence of a clear abuse thereof appearing in the record. [Citation.] The burden rests on the complaining party to demonstrate from the record that such an abuse has occurred." (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984-985.) If denial of a continuance has the practical effect of depriving a party of a fair hearing, that denial is an abuse of discretion and is reversible error. (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.)

B

Moving for a continuance at the beginning of the hearing, Mother's counsel stated: "[He] first became aware of this case on Friday afternoon, and we simply have not had an opportunity to do the necessary legal preparation for this case to conduct the merits hearing today. And, therefore, we would like to seek a one month continuance in order to fully prepare the case as it needs to be prepared." When the trial court asked Mother's counsel whether he wanted Valerie to remain in child protective custody for a month, he replied: "[W]e have to balance the interest of preparing the case, as obviously we have a concern as to having the child remain in custody. We would be willing to do a slightly shorter period, but we do need time to put together the case adequately." The court noted that proceedings under the Convention do not provide rights to discovery or cross-examination of witnesses and the issues are typically straightforward. Mother's counsel argued that he had not had an opportunity to review Mother's documentation regarding her claim that she was a victim of domestic violence by Father and that documentation may show there could be grave risks to Valerie were she returned to Colombia. By then proceeding with the hearing on the merits of the petition, the trial court impliedly denied Mother's motion for a continuance.

Before Mother and Father testified, Mother's counsel renewed his motion for a continuance, arguing: "[W]e have not had an opportunity to review . . . all of the facts, have not had an opportunity to review the evidence and respond to the allegations. [Mother's counsel] is in no position to effectively provide the representation that we desire to provide today." He further argued he had "just [become] aware of this case on

Friday" and he had not had an opportunity to review about 100 pages of documents or meet with Mother to discuss her version of the facts. The trial court denied the renewed motion for continuance of the hearing. Mother's counsel stated that he was "under the impression [he] would be able to obtain a continuance" and requested a brief recess so that he could review some of Mother's documentation. The trial court granted the request of Mother's counsel for a one-half hour recess, after the court heard Mother's testimony.

The trial court also denied the subsequent request of Mother's counsel for a continuance so that he could obtain United States Department of State reports regarding the conditions in Colombia. The court then heard the testimony of Father and further testimony of Mother. The court also allowed Mother's counsel an opportunity to make an offer of proof regarding other evidence that could support Mother's opposition to the petition.

C

We conclude the trial court did not abuse its discretion by denying Mother's motions for a continuance of the hearing on the petition. The court could have reasonably concluded Mother did not make the requisite affirmative showing of good cause requiring continuance of the hearing. The court could have reasonably concluded Mother's counsel did not show why he could not, in the exercise of reasonable diligence, conduct legal research, interview Mother, and review her documents during the almost three-day period between the time he learned of the petition on May 1, 2009, and the beginning of the hearing on the afternoon of May 4. To the extent Mother's counsel complained he did not have an opportunity to review Mother's documents, the trial court

granted his request for a recess to allow him to translate and review those documents. Contrary to Mother's assertion on appeal, there is nothing in the record showing her bilingual counsel was unable to adequately interpret those Spanish language documents during the recess.

As Father notes, the Convention establishes procedures for the *prompt return* of children to their countries of habitual residence. (*Forrest, supra,* 144 Cal.App.4th at p. 1210.) The Convention and ICARA contemplate that trial courts will conduct expeditious proceedings and make expeditious rulings on petitions to return children to their countries of habitual residence. (Convention, art. 2; 42 U.S.C. § 11601(a)(4); *March v. Levine* (6th Cir. 2001) 249 F.3d 462, 475.) Considering the expedited nature of proceedings under the Convention and our review of the record in this case, we conclude the trial court did not abuse its discretion by denying Mother's motions for continuance of the hearing on the petition. The court did not abuse its discretion by concluding Mother's counsel did not make an affirmative showing of good cause to continue the hearing for one month or, for that matter, any lesser period of time, especially because Valerie would have had to remain in protective custody during that period. None of the cases cited by Mother are apposite to this case or persuade us to conclude otherwise. (*Wipranik v. Superior Court* (1998) 63 Cal.App.4th 315; *Darley v. Ward* (1980) 28 Cal.3d 257.)

IV

Deputy District Attorney's Appearance on Behalf of Father

Mother contends she was denied her due process right to a fair and impartial hearing because the San Diego County Deputy District Attorney (DA) wrongfully

represented Father at the hearing. On announcing her appearance at the hearing on the petition, the DA stated she was appearing "on behalf of the People, on behalf of the petitioner [Father], as well . . . ." Mother argues the DA's representation of Father at the hearing violated Family Code section 3455, subdivision (b), which provides: "A district attorney acting under this section [regarding proceedings under the Convention] acts on behalf of the court and may not represent any party."

When the DA announced that she appeared on behalf of Father (in addition to the trial court) at the hearing on the petition, we believe she acted as his counsel and therefore violated Family Code section 3455, subdivision (b).[2] However, we conclude Mother waived that error by not objecting below when the DA announced her representation of Father and thereafter purportedly acted as his counsel. (Cf. *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 279, fn. 13; *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn.3.) Nevertheless, assuming arguendo Mother did not waive that error by not objecting below, we conclude Mother has not carried her burden on appeal to show she was prejudiced by the DA's erroneous representation of Father. On the contrary, because the DA properly filed the petition in the trial court requesting Valerie's return to Colombia, the DA's interest in the proceeding under the Convention presumably coincided with that of

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2 We are not persuaded by Father's argument that the DA, in stating she "appeared on behalf of" Father, did not actually state she was acting as his counsel and therefore did not represent him at the hearing. We believe it is commonly accepted that when counsel states his or her appearance on behalf of a party at the beginning of a hearing, that appearance is made as that party's counsel and not in some other undefined capacity.

Father, who was named as the petitioner. Although the DA's proper role under Family Code section 3455 was to act on behalf of the trial court during the proceeding, Mother does not show that it is reasonably probable she would have obtained a more favorable result had the DA not acted as Father's counsel in addition to acting on behalf of the trial court. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) We conclude neither the trial court nor the DA committed reversible error when the DA acted as Father's counsel at the hearing.

Furthermore, Mother does not cite any case or other authority showing that the DA's representation of Father violated her constitutional due process right to a fair and impartial hearing. Therefore, we conclude she has not carried her burden on appeal to present a substantive analysis of applicable law and the facts showing her constitutional right was violated. Absent such substantive analysis, we conclude she has, in effect, waived any appellate contention regarding the purported violation. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 (*Falcone*).) In any event, were we to address the merits of the constitutional violation claim, we most likely would conclude Mother was not denied a fair and impartial hearing when the DA represented Father in addition to acting on behalf of the trial court.

V

Exclusion of Evidence

Mother contends the trial court erred by excluding certain evidence.

A

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "We review a trial court's relevance determination under the deferential abuse of discretion standard." (*People v. Jablonski* (2006) 37 Cal.4th 774, 821.) To the extent evidence is erroneously excluded under California law, we apply the *Watson* standard to determine whether the error was prejudicial. (*Jablonski,* at p. 821; *People v. Wallace* (2008) 44 Cal.4th 1032, 1060 (*Wallace*); *Watson*, *supra*, 46 Cal.2d at p. 836.)

B

Mother asserts the trial court erred by excluding: (1) Spanish language e-mail correspondence between Mother and Father; and (2) a State Department report regarding conditions in Colombia.[3] Regarding the e-mail evidence, Mother argues the trial court erred by denying her counsel the opportunity to have those Spanish language e-mails translated and admitted in evidence. However, as discussed above, the trial court granted the request of Mother's counsel for a recess to translate and review Mother's documents, which presumably included that e-mail correspondence. After the recess, Mother's counsel then quoted or described English translations of certain excerpts of those e-mails.

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[3] To the extent Mother also asserts in her opening brief that the trial court erred by excluding reports of the trial court's investigator and an unidentified Colombian police report, we conclude she waived that error on appeal by not providing any substantive analysis of the law or facts regarding those purported errors. (*Falcone, supra,* 164 Cal.App.4th at p. 830.)

Her counsel then requested an opportunity to obtain certified translations of those documents. The court implicitly denied that request and asked him whether he had any other offers of proof that might show a grave risk to Valerie were she returned to Colombia. The court apparently reviewed the e-mails and other documents off the record and concluded they did not constitute threats as Mother asserted. However, the record does not show Mother's counsel ever expressly offered that e-mail correspondence for admission in evidence. Accordingly, Mother has not shown the trial court erred by excluding evidence she presented for admission at the hearing. In any event, assuming arguendo the court excluded those documents, she has not presented any substantive analysis showing that exclusion of those documents was prejudicial to her case (i.e., it is reasonably probable she would have obtained a more favorable result had those documents been admitted). (*Falcone*, *supra*, 164 Cal.App.4th at p. 830; *Wallace*, *supra*, 44 Cal.4th at p. 1060; *Watson*, *supra*, 46 Cal.2d at p. 836.)

Regarding the State Department report on the conditions in Colombia, Mother's counsel did not have a copy of the report at the hearing and made no offer of proof regarding what it would have stated had it been available for admission in evidence. Her counsel admitted at the hearing that he "would only be speculating" what that report would state. Because the report was not offered in evidence by Mother, the trial court did not exclude it and therefore did not err in purportedly excluding it. To the extent Mother argues the trial court should have continued the hearing to allow her to obtain a copy of the report, she does not show the court abused its discretion by denying a continuance or that the denial was prejudicial (i.e., it is reasonably probable she would have obtained a

more favorable result had the hearing been continued and the report admitted in evidence). (*Falcone*, *supra*, 164 Cal.App.4th at p. 830; *Wallace*, *supra*, 44 Cal.4th at p. 1060; *Watson, supra*, 46 Cal.2d at p. 836.) Furthermore, Mother does not present any substantive analysis on appeal showing her inability to present that report violated her constitutional due process right to a fair and impartial hearing. (*Falcone*, at p. 830.) She merely speculates the report would have shown that she was not trying to escape Colombia's custody laws, but rather was avoiding an abusive husband who posed a grave risk to Valerie and her. Mother has not carried her burden on appeal to show the trial court committed reversible error by excluding the State Department report or by denying her request for a continuance of the hearing to allow her to obtain that report.

DISPOSITION

The order is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.